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IN THE

Supreme Court of the United States

October Term, 1948

No. 275 + 119 MISC.

JESSIE A. KILPATRICK,

Petitioner,

—against—

THE TEXAS AND PACIFIC RAILWAY COMPANY,

Respondent.

No. 276 + 120 MISC.

L. M. PARKER,

Petitioner,

—against—

THE TEXAS AND PACIFIC RAILWAY COMPANY,

Respondent.

PETITIONS FOR WRITS OF CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS AND FOR A WRIT OF PROHIBITION TO THE DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, AND BRIEF IN SUPPORT THEREOF

WILLIAM H. DEPARCQ
2535 Rand Tower
Minneapolis, Minnesota

GERALD F. FINLEY and
ARNOLD B. ELKIND
545 Fifth Avenue
New York, N. Y.
Counsel for Petitioners.

INDEX

Preliminary Statement 1

Petition 1

Summary Statement of Matter Involved 3

Principal Questions Passed on by District Court 3

Proceedings in the Circuit Court of Appeals 3

Summary of Facts 4

Basis of Court's Jurisdiction 6

Questions Presented 7

Reasons Relied on for Allowance of Writs 8

Prayer 9

Brief in Support of Petitions for Certiorari and Prohibition 11

Statement of the Case 11

Specifications of Errors 12

Statute Involved 15

Rule Involved 15

ARGUMENT 13

PAGE

POINT I

This Court has power to issue all necessary writs in aid of its appellate jurisdiction 13

POINT II

The filing of the Notices of Appeal and bonds under Rule 73 removed jurisdiction from the District Court 14

POINT III

The Court below erroneously denied plaintiffs the absolute right of venue expressly conferred by the Federal Employers' Liability Act 16

CONCLUSION 18

TABLE OF CASES CITED

Atlantic Coast Line Co. v. Winn, 227 Fed. 50 4

Baltimore & Ohio R. R. Co. v. Kepner, 314 U. S. 44 .....8, 16
Barnett v. The Texas and Pacific Railway Company, 145 F. (2d) 800 12
Bergeron v. Mansour, 152 F. (2d) 27 14
Berman v. U. S., 302 U. S. 211 13

Casalduc v. Diaz Gonzalez, 117 F. (2d) 915 14
Cheney Co. v. Cunningham, 29 F. Supp. 847 17
Crump v. Hill, 104 F. (2d) 36 14

Dominion Electrical Mfg. Co. v. Edwin L. Wiegand Co., 126 F. (2d) 172 17
Draper v. Davis, 102 U. S. 370 13

PAGE

Enelow v. New York Life Insurance Co., 293 U. S. 379 14
Ettelson v. Metropolitan Life Ins. Co., 317 U. S. 188 14
Ex parte Republic of Peru, 318 U. S. 578 13

Gold v. George T. Moore Sons Inc., 3 F. R. D. 201 17
Grand Trunk Western R. Co. v. McHie, 100 F. (2d) 86 4
Gulf Oil Corporation v. Gilbert, 330 U. S. 501 8

Heike v. U. S., 217 U. S. 423 4
Home Owners Loan Corporation v. Huffman, 139 F. (2d) 314 17
Huskey v. U. S., 29 F. Supp. 283 17

In Re: National Labor Relations Board, 304 U. S. 486 13
In Re: The Petition of United States, 263 U. S. 389 4

Keyser v. Farr, 105 U. S. 265 13
Kilpatrick v. The Texas and Pacific Railway Company, 166 F. (2d) 788 ..... 2, 5

Lambert v. Dempster Bros., Inc., 34 F. Supp. 610 17
Lawson v. Moore, 29 F. Supp. 175 17
Lewis-Hall Iron Works v. Blair, 23 F. (2d) 972 14
Lyman v. U. S., 138 F. (2d) 509 17

McCann v. Bentley Stores Co., 34 F. Supp. 234 17
Miller v. U. S., 114 F. (2d) 267 14
Miles v. Illinois Central R. Co., 315 U. S. 698 .....8, 16

Newton, et al. v. Consolidated Gas Co. of New York, 258 U. S. 165 13

Oblak v. Armour & Co., 1 F. R. D. 648 17
O'Leary v. Liggett Drug Co., 1 F. R. D. 272 17

PAGE

Ring v. Spina, 2 C. C. A., 166 F. (2d) 546 14
Roche v. Evaporated Milk Ass'n, 319 U. S. 21 4
Ryerson & Haynes, Inc. v. American Forging & Socket Co., 2 F. R. D. 343 17

Scripps-Howard Radio Inc. v. Federal Communications Commission, 316 U. S. 4 13
Scruggs v. Casco Corp., 32 F. Supp. 625 16
Smith v. Whitney, 116 U. S. 167 4
Stanley Works v. C. S. Mersick & Co., 34 F. Supp. 913 16

Taylor v. Swift & Co., 2 F. R. D. 424 17
The Washington, 16 F (2d) 206 14

U. S. v. Elm Spring Farm Co., 38 F. Supp. 508 17
U. S. v. Newbury Mfg. Co., 23 F. (2d) 473 14
U. S. v. Radice, 40 F. (2d) 445 14

Walleck v. Hudspeth, 128 F. (2d) 343 14
Welter v. E. I. Dupont De Nemours & Co., 1 F. R. D. 551 17

Other Authorities Cited

PAGE

Federal Employers' Liability Act (45 U. S. C. A. 56)
Section 6 ..... 3, 7, 8, 12, 15, 16, 17, 18

28 U. S. C. A. 225 4

28 U. S. C. A. 227 14

Sections 240(a) and 262 of Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. 347, 377) 6, 7, 13

Sections 1254(1), 1651(a), 2101(d) of Federal Judicial Code (Title 28, U. S. Code) 6, 7, 13

Rules of Civil Procedure

Rule 41 ..... 8, 12, 17

Rule 41(a)(2) 15

Rule 73 14

IN THE

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No., Miscellaneous

JESSIE A. KILPATRICK,

Petitioner,

—against—

THE TEXAS AND PACIFIC RAILWAY COMPANY,

Respondent.

No., Miscellaneous

L. M. PARKER,

Petitioner,

—against—

THE TEXAS AND PACIFIC RAILWAY COMPANY,

Respondent.

MOTION FOR LEAVE TO FILE PETITIONS FOR WRITS OF PROHIBITION

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioners, Jessie A. Kilpatrick, a resident of Alabama and L. M. Parker, a resident of Texas, move the

Court for leave to file the Petitions hereto annexed for Writs of Prohibition, pursuant to Section 1651 of the new Judicial Code and further move that orders and rules be entered and issued directing the District Court for the Northern District of Texas, to show cause why a Writ of Prohibition should not be issued to said Court in accordance with the prayer of said petitioners and why the petitioners should not have such other and further relief as may be just in the premises.

Dated, September 15, 1948.

JESSIE A. KILPATRICK

L. M. PARKER

Petitioners

By WILLIAM H. DEPARCQ
2535 Rand Tower
Minneapolis, Minnesota.

GERALD F. FINLEY and
ARNOLD B. ELKIND
545 Fifth Avenue
New York City, N. Y.
Counsel for Petitioners

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PETITIONS FOR WRITS OF CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS AND FOR A WRIT OF PROHIBITION TO THE DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, AND BRIEF IN SUPPORT THEREOF

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Preliminary Statement

This petition is respectfully submitted for the purpose of enabling the Court to pass upon the entire conflict in jurisdiction and venue now existing as a result of the refusal of the District Court for the Northern District of Texas and the Circuit Court of Appeals for the Fifth Circuit to permit a dismissal of actions commenced by the Petitioners in the District Court for the Northern District of Texas following a decision of the Circuit Court of Appeals in the Second Circuit in the case of *Jessie A. Kilpatrick* v. *The Texas and Pacific Railway Company*, 166 F. (2d) 788. The Texas and Pacific Railway Company has petitioned for certiorari to the Circuit Court of Appeals for the Second Circuit, said petition and brief in support thereof being No. 839 and 840 in the October 1947 Term of this Court.

Petition

Jessie A. Kilpatrick and L. M. Parker, jointly pray for the issuance of writs of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, to bring up to this Court an appeal by Petitioners now pending in said Court prior to submission, hearing or judgment, from proceedings in the District Court for the Northern District of Texas, and for a writ of prohibition to the District Court for the Northern District of Texas upon the ground that it has been divested of its jurisdiction over the action there pending.

Summary Statement of Matter Involved

Principal Questions Passed on by the District Court

The District Court determined that it could deny to the plaintiffs the privilege of venue selection given by Section 6 of the Federal Employers' Liability Act (45 U. S. C. A., 56) by refusing to allow a dismissal of said actions without prejudice either with or without terms and in so doing applied the doctrine of *forum non conveniens*.

The District Court has also decided that it can and will proceed with the trial of said actions in spite of the fact that an appeal was perfected to the Circuit Court of Appeals for the Fifth Circuit from the order denying to the plaintiffs the right to dismiss their actions.

Proceedings in the Circuit Court of Appeals

Appeals are presently pending in the Court of Appeals for the Fifth Circuit from that portion of an order of the District Court which denied the plaintiffs' motions to dismiss without prejudice. After the appeals had been perfected, the plaintiffs presented to the Circuit Court of Appeals for the Fifth Circuit petitions for writs of prohibition, being numbers 12298 and 12299, in that Court, and on April 13, 1948 the petitions were denied in a *Per Curiam* opinion which is as follows:

> "Petitioners, plaintiffs in separate suits in the court below, moved there for a dismissal without prejudice of their suits. Their motions denied, each filed notice of appeal. Alleging that respondent notwithstanding their appeals had set the causes for trial and, unless prohibited from doing so, would proceed to trial in them, each has filed a petition for writ of prohibition."

"This court may issue writs of prohibition only in aid of its jurisdiction to review final decisions of the district courts. It appears from the motion papers and the answers thereto that petitioners' attempted appeals from orders denying dismissal are not from final judgments. It is quite plain that this court is without jurisdiction to consider the merits of the questions sought to be raised in the applications for the writs and that for want of jurisdiction the petitions must be denied."

In a footnote the following authorities were cited: 28 U. S. C. A. 225; *Smith* v. *Whitney,* 116 U. S. 167; *In Re: The Petition of United States,* 263 U. S. 389; *Roche* v. *Evaporated Milk Ass'n.,* 319 U. S. 21; *Grand Trunk Western R. Co.* v. *McHie,* 100 F. (2d) 86; *Atlantic Coast Line R. Co.* v. *Winn,* 227 Fed. 50; *Heike* v. *U. S.,* 217 U. S. 423.

Summary of Facts

Although separate but substantially identical records are being filed in these two cases, a joint brief will be employed for the purpose of brevity and convenience. Record references are to the Kilpatrick record only.

Although Petitioners were injured in separate accidents, all questions of law and procedure involved in these two petitions are identical. Except for the dates of the accidents (Kilpatrick, November 20, 1946; Parker, July 13, 1946) the significant chronology is the same, and the only other dissimilarity of conceivable relevance pertains to Kilpatrick's citizenship and residence in Alabama and that of Parker in Texas.

While these men were employed in interstate commerce by The Texas and Pacific Railway Company at Big Spring,

Texas, they were involved in accidents, and Kilpatrick lost both of his legs while Parker lost one leg.

Both plaintiffs filed suits in the United States District Court for the Southern District of New York on December 23, 1946. For a history of the proceedings in that Court, we respectfully refer to the opinion of Judge Hand in the Circuit Court of Appeals for the Second Circuit, reported at 166 F. (2d) 788, and the opinions of the District Court reported at 72 F. Supp. 635 and 72 F. Supp. 632. As heretofore indicated, this petition is correlated to a petition for certiorari and brief in support thereof arising from the litigation in the Second Circuit bearing the title "The Texas and Pacific Railway Company, Petitioner, vs. Jessie A. Kilpatrick, Respondent", being Nos. 839 and 840 in the October 1947 Term of this Court.

For the purpose of chronological continuity, we merely repeat here that the actions in the New York Court were commenced on December 23, 1946; that after elaborate procedural difficulties the cases were dismissed on July 16, 1947 (72 F. Supp. 635); that an appeal was taken to the Circuit Court of Appeals and the judgments of dismissal were reversed on March 4, 1948 (C. C. A. 2, 166 F. (2d) 788).

On September 12, 1947, and approximately nine months after instituting the New York actions, the plaintiffs filed additional actions in the United States District Court for the Northern District of Texas (R. 1, 7). On October 4, 1947, the defendant filed its answers consisting of admissions and denials, but containing no counterclaim or prayer for affirmative relief (R. 8, 10). Various depositions were taken in Texas in December, 1947 (R. 10). On March 9, 1948 (R. 25), being five days after the decision of the Second Circuit Court of Appeals, and one day after plaintiffs' counsel became familiar with its nature (R. 27, 28)

motions to dismiss the Texas actions were served and filed (R. 25). The previous day, March 8, 1948, defendant had filed in each case a "Petition for Declaratory Judgment" which alleged that on the complaint and answer an "actual controversy" existed, and which moved for "appropriate relief" based on the legal rights and relations of the parties (R. 24).

On March 15, plaintiffs filed motions to strike defendant's petitions for declaratory judgment (R. 47). Plaintiffs also moved for a general continuance until the New York proceedings could culminate in a final judgment (R. 57). The trial court denied the general continuance (R. 65) and also denied both plaintiffs' motions to strike the petitions for declaratory judgment and their motions to dismiss without prejudice (R. 48).

Thereafter plaintiffs perfected appeals to the Fifth Circuit Court of Appeals, where the cases are now pending, from that portion of the order denying their motions to dismiss without prejudice (R. 49, 55).

Basis of Court's Jurisdiction

The jurisdiction of this Court is invoked pursuant to Sections 240(a) and 262 of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. 347, 377).

The new Federal Judicial Code (Title 28, U. S. Code, Sections 1254(1), 1651(a), 2101(d)) provides as follows:

> SECTION 1254 provides that the Supreme Court may review by certiorari any civil case in the Circuit Court of Appeals either before or after rendition of judgment or decree.

SECTION 1651 provides that the Supreme Court may issue all writs necessary or appropriate in aid of its jurisdiction agreeable to the usages and principles of law.

SECTION 2101 provides that an application to the Supreme Court for certiorari to review a case before judgment in the Circuit Court of Appeals may be made at any time before judgment.

Questions Presented

The principal questions involved are these:

A. Whether this Court in the exercise of its power to issue all necessary writs (28 U. S. C. A. 377; Judicial Code 262) should assume jurisdiction of both the New York and Texas litigation between these parties and resolve in one decision the venue and jurisdictional conflict between the lower Federal courts.

B. Whether the court below erroneously denied plaintiffs the privilege of venue selection under Section 6 of the F. E. L. A. (45 U. S. C. A. 56) by refusing to allow dismissals without prejudice, either with or without terms, of the Texas actions.

C. Whether this Court should issue an appropriate writ under Section 262 of the Judicial Code (28 U. S. C. A. 377) to the Fifth Circuit Court of Appeals and the United States District Court for the Northern District of Texas, to protect the plaintiffs in the exercise of rights expressly granted by the Federal Employers' Liability Act.

Reasons Relied on for Allowance of Writs

In order to preserve jurisdiction over the entire conflict in venue arising from the New York and Texas litigation between the parties, it is essential that writs of certiorari and prohibition, or such other writ as may be appropriate, be issued so as to resolve the unseemly conflict between the lower Federal courts and to settle the important questions of jurisdiction, venue and procedure under the F. E. L. A. raised by this litigation.

This is an instance in which this Court should exercise its power of supervision by reason of the departures of the courts below from the accepted and usual course of judicial proceedings.

By refusing to permit petitioners the privilege to dismiss the Texas actions, the Texas courts have in effect deprived the plaintiffs of their choice of venue by an application of the doctrine of *forum non conveniens* in an F. E. L. A. case in disregard of and in violation of decisions of this Court in *Baltimore & Ohio R. R. Co.* v. *Kepner*, 314 U. S. 44, *Miles* v. *Illinois Central R. Co.*, 315 U. S. 698 and *Gulf Oil Corporation* v. *Gilbert*, 330 U. S. 501.

It is contrary to the invariable current of Federal authority to allow a carrier employer, in an action brought under the Federal Employers' Liability Act, to deprive an employee plaintiff of his right of dismissal without prejudice pursuant to Rule 41 of the Rules of Civil Procedure by using the device of a petition for declaratory judgment, this device in such instance being offensive to the entire purpose of the Federal Employers' Liability Act.

PRAYER

For the reasons outlined above, and discussed more in detail, and with supporting authorities in the accompanying brief, your petitioners pray that writs of certiorari, prohibition or such other writs as to this Court may seem just and appropriate, issue out of this Court directed to the United States Circuit Court of Appeals for the Fifth Circuit and to the United States District Court for the Northern District of Texas, commanding and directing said District Court to refrain from further proceedings in said causes, and commanding the Circuit Court of Appeals of the Fifth Circuit to certify and send to this Court the transcript of record in the case entitled *Jessie A. Kilpatrick, Appellant* v. *The Texas and Pacific Railway Company, Appellee,* being number 12330 in that court, and the case of *L. M. Parker, Appellant* v. *The Texas and Pacific Railway Company, Appellee,* being number 12344 in that court, and including all proceedings in said Circuit Court of Appeals with reference to a writ or prohibition being In Re: Jessie A. Kilpatrick, Number 12298 and In Re: L. M. Parker, Number 12299, to the end that no further proceedings shall be had or taken in either of the courts below until this Court may review and determine all questions of jurisdiction

and venue arising out of both the New York and Texas litigation between said parties.

JESSIE A. KILPATRICK

L. M. PARKER

Petitioners

By WILLIAM H. DEPARCQ
2535 Rand Tower
Minneapolis, Minnesota.

GERALD F. FINLEY and
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Respondent.

BRIEF IN SUPPORT OF PETITIONS FOR CERTIORARI AND PROHIBITION

Statement of the Case

The history and procedural aspects of the litigation is sufficiently covered in the petitions. In selecting the New York jurisdiction as their primary and original choice, the

plaintiffs relied on *Barnett* v. *The Texas and Pacific Railway Company*, Second Circuit, 145 F. (2d) 800, which was decided on November 29, 1944. This case definitely held that the defendant was subject to suit and amenable to process in the United States District Court for the Southern District of New York.

Relying thereon, the plaintiffs exercised an important and valuable right expressly granted to them by the Congress of the United States. All of their further efforts have been in the defense and in the assistance of that right, together with the taking of precautionary measures not inconsistent with its exercise.

Specifications of Errors

The Texas Court erred:

1. In applying the doctrine of *forum non conveniens* to an F. E. L. A. case.

2. In effectuating a denial to the plaintiffs of their primary and original choice of venue in New York.

3. In depriving plaintiffs of their right to dismiss without prejudice under Rule 41.

4. In setting actions for trial after filing and perfection of appeals from orders denying dismissal.

ARGUMENT

POINT I

This Court has power to issue all necessary writs in aid of its appellate jurisdiction.

The Supreme Court is empowered, by Section 262 of the Judicial Code (28 U. S. C. A. 377) and after September 1, 1948 by Title 28, U. S. Code, Section 1651, to issue all writs necessary or appropriate in aid of its appellate jurisdiction agreeable to the usages and principles of law. The supervisory power of this Court under this statute over a district judge was affirmed in *Ex parte Republic of Peru*, 318 U. S. 578, where the Court pointed out that the writs afford an expeditious and effective means of confining the inferior court to a lawful exercise of its prescribed jurisdiction.

To the same effect see also *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U. S. 4; *In Re*: *National Labor Relations Board*, 304 U. S. 486; *Berman* v. *U. S.*, 302 U. S. 211; *Draper* v. *Davis*, 102 U. S. 370; *Keyser* v. *Farr*, 105 U. S. 265.

That the Texas court has set these lawsuits for trial on October 18, 1948 unless restrained, is contrary to *Newton, et al.* v. *Consolidated Gas Co., of New York*, 258 U. S. 165, which declared the general rule that an appeal suspends the power of the court below to proceed further in the case.

POINT II

The filing of the notices of appeal and bonds under Rule 73 removed jurisdiction from the District Court.

In *Ring* v. *Spina*, 2 C. C. A., 166 F. (2d) 546, an order striking a cause from the jury calendar was held appealable as it was in substance the grant of an injunction against an action at law and reviewable under 28 U. S. C. A. 227, as interpreted by *Enelow* v. *New York Life Insurance Co.*, 293 U. S. 379 and *Ettelson* v. *Metropolitan Life Ins. Co.*, 317 U. S. 188.

It would seem clear that a refusal to permit a termination of litigation has the element of finality necessary for appealability although technically, as in *Ring* v. *Spina* (*supra*), the action continues. In practical effect the setting of a trial date also accomplishes the same result as would an injunction against the maintenance of the New York litigation.

That sole jurisdiction of these cases is now lodged in the Fifth Circuit Court of Appeals would appear from such cases as *Miller* v. *U. S.*, 114 F. (2d) 267; *Walleck* v. *Hudspeth*, 128 F. (2d) 343; *Bergeron* v. *Mansour*, 152 F. (2d) 27; *Crump* v. *Hill*, 104 F. (2d) 36; *U. S.* v. *Newbury Mfg. Co.*, 23 F. (2d) 473; *Lewis-Hall Iron Works* v. *Blair*, 23 F. (2d) 972; *The Washington*, 16 F. (2d) 206; *Casalduc* v. *Diaz Gonzalez*, 117 F. (2d) 915; *U. S.* v. *Radice*, 40 F. (2d) 445.

In one form or another, these decisions hold in substance that the filing of an appeal transfers all jurisdiction of the cause to the Appellate Court and that thereafter the lower court is without power or authority to take further proceedings, or make any further orders except to preserve the status quo.

Statute Involved

The statute involved is Section 6 of the Federal Employers' Liability Act (45 U. S. C. A., Section 56) which in relevant part provides:

> "Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States, and no case arising under this chapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States."

Rule Involved

Rule 41(a)(2) of the Federal Rules of Civil Procedure provides as follows:

> "*By Order of Court.* Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice."

POINT III

The court below erroneously denied plaintiffs the absolute right of venue expressly conferred by the Federal Employers' Liability Act.

The trial court was imbued with the normally sound philosophy that these cases should be tried where the defendant lives and the accident occurred (R. 65) and said "both reasons existed here" (R. 65). He said that the entire background of jurisprudence favors this (R. 65). But Congress in the Federal Employers' Liability Act with its special venue provisions, has decreed otherwise, and this Court has spoken unmistakably in the *Miles* and *Kepner* cases. The delay, complications and confusion now existing and the unseemly race and conflict before Federal tribunals in New York and Texas, have resulted from purely technical maneuvers employed by the defendant. Despite the "thicket" of procedure, the question is essentially simple. If jurisdiction exists in New York, the plaintiffs should be permitted to try their lawsuits there; if it does not, the cases should proceed in their secondary choice, in Texas.

Contrary to reason and uniform authority, the Texas court allowed defendant to deprive plaintiffs of the fruits of a long and expensive victory in the New York courts, employing a sham and meaningless counterclaim or petition for declaratory judgment to cut off their right to a voluntary non-suit or dismissal. This technical maneuver, transparent in purpose, would ordinarily have been rendered nugatory. *Stanley Works* v. *C. S. Mersick & Co.*, 34 F. Supp. 913.

In *Scruggs* v. *Casco Corp.*, 32 F. Supp. 625, such a counterclaim was described as unjustified and was called "a wholly redundant flourish appended to the answer". See

also *Cheney Co.* v. *Cunningham*, 29 F. Supp. 847; *Lambert* v. *Dempster Bros., Inc.*, 34 F. Supp. 610; *O'Leary* v. *Liggett Drug Co.*, 1 F. R. D. 272; *Oblak* v. *Armour & Co.*, 1 F. R. D. 648; *Dominion Electrical Mfg. Co.* v. *Edwin L. Wiegand Co.*, 126 F. (2d) 172.

Even the incidental annoyance of new or subsequent litigation (and this is absent here), has never been regarded as sufficient to destroy the traditional right of voluntary non-suit. It has never been the policy of the law in the absence of a bona fide counterclaim, to force an unwilling plaintiff to submit his case to some particular court. Rule 41 is declaratory of long established practice in this regard. *Home Owners Loan Corporation* v. *Huffman*, 139 F. (2d) 314.

In *Lyman* v. *U. S.*, 138 F. (2d) 509, a distinction was made between former and subsequent litigation in another court and it was held under Rule 41 that plaintiff should be permitted to dismiss "to prosecute any other timely proceeding upon the same subject matter now pending in another court."

See also *Lawson* v. *Moore*, 29 F. Supp. 175; *McCann* v. *Bentley Stores Co.*, 34 F. Supp. 234; *Huskey* v. *U. S.*, 29 F. Supp. 283; *Oblak* v. *Armour & Co.*, 1 F. R. D. 648; *Welter* v. *E. I. Dupont DeNemours & Co.*, 1 F. R. D. 551; *Taylor* v. *Swift & Co.*, 2 F. R. D. 424; *Ryerson & Haynes, Inc.* v. *American Forging & Socket Co.*, 2 F. R. D. 343; *U. S.* v. *Elm Spring Farm Co.*, 38 F. Supp. 508; *Gold* v. *George T. Moore Sons, Inc.*, 3 F. R. D. 201.

These cases affirm the right of a plaintiff, under Rule 41, to dismiss without prejudice under a variety of circumstances, sometimes with, and sometimes without, terms.

Certainly in an F. E. L. A. case the employee's right to dismiss should be relatively unimpeded and never completely extinguished.

It is unnecessary to cite to this Court its numerous decisions affirming that the rights of an injured plaintiff under the F. E. L. A. must be given a liberal and humanitarian interpretation. If Congress has "loaded the dice" in his favor, and permitted him to shop for a forum, it was only to offset and counterbalance the very great and numerous advantages possessed by the carrier in a case of this kind.

CONCLUSION

The preservation of harmony between lower Federal courts on questions of jurisdiction and venue, as well as the safeguarding of rights expressly granted by a Federal statute, are at issue. By exercising its undeniable power to issue the writs sought, the jurisdiction of this Court to pass on these important questions will be preserved and the entire subject matter may be reviewed.

Respectfully submitted,

WILLIAM H. DEPARCQ
2535 Rand Tower
Minneapolis, Minnesota.

GERALD F. FINLEY and
ARNOLD B. ELKIND
545 Fifth Avenue
New York City, N. Y.
Counsel for Petitioners